SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 671

JOSEPH IRVING McMULLEN,

Petitioner,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Date of Judgment of Court of Claims.

The judgment of the Court of Claims was rendered on December 6, 1943 (R. 26).

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. 288; 43 Stat. 939 as amended.

Statement of the Case.

A full statement of the facts relating to the case are set forth in the petition for the writ filed herein from pages 1 to 6.

(Note:) Unless otherwise stated, all italics have been supplied by the writer.

Summarized, these facts are as follows:

Petitioner brought suit in the Court of Claims to recover pay and allowances as colonel in the United States Army on the active list for a short period of time and as colonel on the retired list from May 29, 1936.

Petitioner enlisted in the regular Army of the United States as a private on April 11, 1896, and continued in the regular Army of the United States, having been raised in rank from time to time until finally he was a colonel assigned to the Judge Advocate General's Department. He completed forty years of service on April 11, 1936. During this forty year period, from 1906 to 1916 he was an officer on the retired list of the Army. On June 3, 1916, under the provisions of the Act of March 4, 1915, he was restored to active duty (R. 7).

On June 6, 1935, he was indicted for a violation of section 133 of the Criminal Code, 18 U. S. C. A. 203 (R. 9) and was tried upon said indictment and convicted on April 30, 1936, and on May 8, 1936, was sentenced to imprisonment and fined (R. 9).

Section 113 of the Criminal Code provides that any officer of the United States who does any of the things denounced in said section shall be fined *and* imprisoned *and* "thereafter be incapable of holding any office of honor, trust or profit under the Government of the United States."

Petitioner immediately perfected an appeal to the United States Court of Appeals for the District of Columbia from the judgment so rendered on said conviction. On May 21, 1938, said judgment and conviction were reversed and on June 30, 1939, a *nolle prosequi* was entered in said criminal cause (R. 10). Rule 5 of the Supreme Court Rules of Practice and Procedure in Criminal Cases, as it read in 1936, provided that "an appeal from a judgment of conviction stays the execution of the judgment."

Prior to petitioner's conviction as aforesaid, and on April 11, 1936, petitioner addressed a written communication to the Adjutant General, making application to be placed on the retired list with the rank of colonel, pursuant to the provisions of 10 U. S. C. A. 942 (R. 10), which section provides that when an officer has served forty years in the regular service he shall, if he make application therefor to the President, be retired from active service and placed on the retired list.

No affirmative action by either the President or any Government officer was ever taken on said application (R. 11).

On May 28, 1936, Special Orders No. 127 in the War Department contained an announcement in printed form "that by operation of section 203, Title 18, United States Code, Colonel Joseph I. McMullen, Judge Advocate General's Department, ceased to be an officer of the Army on May 8, 1936."

On May 30, 1936, the President submitted to the Senate, for its advice and consent, the nomination of Lt. Colonel Laubach to be colonel from May 14, 1936, due to the separation of Colonel McMullen from the Army on May 8, 1936, through the operation of section 203, Title 18, U. S. Code (R. 11-12). The Senate gave its consent to the appointment and Laubach was commissioned as colonel June 17, 1936 (R. 14).

Petitioner based his claim upon the grounds:

(a) That he had never ceased to be an officer in the United States Army; that the disqualifying clause of section 113 of the Criminal Code never became operative for the reason that his appeal from said conviction stayed the execution of all parts of the penal provisions of said section and that when the judgment and conviction were reversed and a *nolle prosequi* entered the matter stood as if said action had never been instituted.

(b) That when petitioner made application for retirement for forty years' service on April 11, 1936, he became an officer on the retired list as of that date; that in computing forty years' service, time served on the retired list had to be included in said computation; that under the retirement statute no discretion is vested in anyone except the officer who has served forty years as to whether such officer shall or shall not be retired and that no affirmative action upon the part of the President or any other officer is necessary to carry into effect an application made under such statute.

(c) That the appointment by the President of Laubach as colonel did not operate as a removal of petitioner as an officer of the United States Army.

The Government's position was entirely opposed to each of the propositions relied on by petitioner.

The Court of Claims rendered an opinion upholding each of the Government's contentions and ruling adversely to the contentions of petitioner (R. 19).

Specification of Errors Relied On.

1. The Court of Claims erred in holding that the appeal by petitioner from the judgment pronounced on him by virtue of section 113 of the Criminal Code, while operating to stay the execution of the penal provisions thereof providing for fine and imprisonment, did not operate to stay the penal provisions disqualifying petitioner from thereafter holding an office of trust or profit under the Government of the United States.

2. That the Court of Claims erred in holding that when petitioner was convicted of violating section 113 of the Criminal Code he immediately ceased to be an officer in the United States Army even though petitioner promptly perfected an appeal from the judgment pronounced on

said conviction and said conviction was subsequently reversed by the Appellate Court.

3. That the Court of Claims erred in holding that in computing the time a person has served as a member of the regular Army under the forty year retirement statute, the time served as an officer on the retired list must be excluded.

4. That the Court of Claims erred in holding that in time of peace the President, with the consent of the Senate, can remove an officer of the United States Army by the appointment, confirmation and commissioning of another person to take such officer's place.

5. That the Court of Claims erred in holding that a person can be commissioned as an officer in the United States Army even though there be no vacancy in the list of officers of that rank to which such person was commissioned.

Argument.

1. *The Disqualification Clause of Sec. 113 of the Criminal Code Only Becomes Operative When a Judgment Becomes Final. The Operation Thereof Is Stayed by Appeal.*

The statute involved in this matter reads as follows:

> "Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accu-

> sation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States."
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> Title 18, sec. 203, U. S. C. A.; Criminal Code, sec. 113.

The Court of Claims held that when petitioner was convicted of violating the foregoing section, even though he perfected an appeal therefrom, the disqualification clause immediately became effective and *ipso facto* operated to oust petitioner from the Army of the United States; that as a result thereof petitioner, no longer being a member of the Army, could not be placed on the retired list, even though an appeal was taken from said conviction and the judgment reversed.

Under accepted rules of statutory construction and prior decisions of the Supreme Court, the disqualification clause never became effective until the judgment became final, and that when petitioner perfected his appeal the operation of the entire penalty clause of the statute was stayed.

The statute is highly penal in its nature and therefore must be strictly construed:

> *Prussian* v. *United States*, 282 U. S. 675, 677.
> *United States* v. *Fruit Growers Co.*, 279 U. S. 363, 369.

In *State* v. *Symonds*, 57 Maine 148, 151 (cited with approval in *Kurtz* v. *Moffitt*, 115 U. S. 487, 501), the court, dealing with a statute of Congress providing that on conviction of desertion the person should be deprived of his civil rights, the court said:

> "The statute of congress is a highly penal one, and must be construed most strictly in favor of the citizen."

The statute does not designate when the disqualification shall become effective. Neither does it designate when the other penalties imposed therein shall became enforcible.

The statute provides that any of the designated persons who do any of the acts denounced

> "shall be fined no more than $10,000 *and* imprisoned not more than two years; *and* shall moreover thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States."

The penalties are in the conjunctive and being in the conjunctive they must all operate together or not operate at all.

A court could not impose a sentence of imprisonment and not impose a fine. Neither could a court impose a fine without imposing a sentence of imprisonment. This has been expressly held in the case of *Egan* v. *United States*, 287 Fed. 958, 971, dealing with the same statute involved herein, as follows:

> "Objection is made that the punishment imposed is not that authorized by the statute, and that the judgment is therefore void. Appellant was sentenced to the penitentiary for a term of two years. Section 113 of the Penal Code, under which defendant was sentenced, provides a punishment by fine of not more than $10,000 and imprisonment for not more than two years. It is the rule in the courts of the United States that the judgment in a criminal case must conform strictly to the statute, and that any variation from the provisions of the statute, either in the character or extent of the punishment inflicted, renders the judgment void."

In *Huber* v. *Reily*, 53 Pa. St. 112, 119 (cited with marked approval in *Kurtz* v. *Moffitt*, *supra*) the question was as to the effect of an Act of Congress providing, in cases of conviction for desertion, that such persons "shall be deemed and taken to have voluntarily relinquished and forfeited

their rights of citizenship and their rights to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any right of citizenship thereof."

The Pennsylvania court held the foregoing provision to be an integral part of all the penalties provided and could not be severed from such other penalties. Its language in this regard follows:

> "What, then is its true meaning? As already observed, forfeiture of citizenship, is prescribed as a penalty for desertion, an additional penalty, not for an offense committed before the passage of the act, but for continued desertion, and failure to return or report. *It is not a new consequence of a penalty, but it is an integral part of the thing itself. Nor is it the whole. It is added to what the law had previously enacted to be the penalty of desertion, as imprisonment is sometimes added to punishment by fine.* It must have been intended, therefore, that it should be incurred in the same way, and imposed by the same tribunal that was authorized to impose the other penalties for the offence."

As the penalties cannot be divided they must all operate together and, operating together, if a provision of law prevents the operation of part thereof it must, perforce, prevent the operation of the whole thereof.

An appeal from any judgment of conviction in a United States District Court operates as a stay of the enforcement of any penalties attached to such conviction.

Rule 5 of the Supreme Court Rules of Practice and Procedure in Crminal Cases in 1936 read as follows:

> "An appeal from a judgment of conviction stays the execution of the judgment, unless the defendant pending his appeal shall elect to enter upon the service of his sentence."

Petitioner herein duly perfected his appeal from his conviction and judgment and was enlarged on bail pending said appeal. This stayed the execution of the judgment and prevented the enforcement of any of the penalties prescribed by the statute, which only could become operative when and if the judgment became final.

All laws must be given a reasonable construction. It would be most unreasonable to hold that one who had served as a member of the Army of the United States for a period of forty years could be deprived of the benefits and emoluments of such lengthy service as the result of a conviction or judgment that never became final.

It has always been and always will be the policy of our law that no person shall suffer a penalty or a forfeiture except by the final judgment of a court of competent jurisdiction.

While there are no cases dealing with the statute involved that pass directly on the questioned provision, there are several cases that lend persuasive argument to petitioner's contention and others that have dealt with similar provisions in other statutes.

In *State* v. *Symonds*, 57 Maine 148, the court dealt with the Act which added an additional penalty for desertion by making the offender disqualified from holding any position of trust, honor or profit under the United States, etc. In holding that such disqualifying penalty did not operate until final conviction, the court said:

> "Courts-martial of the United States have exclusive jurisdiction of this offense, and it is only after trial, conviction, and sentence by such court, *and the approval of the same by proper authority,* that a citizen of this State can be denied the right of suffrage, or any right of citizenship under the act of congress in question" (p. 151).

In *Huber* v. *Reily*, 53 Pa. St. 112, the court was also dealing with the same penalties attendant upon a conviction for desertion and held:

> "It means that the forfeiture which it prescribes, like all other penalties for desertion, must be adjudged to the convicted person, *after trial by a court-martial, and sentence approved*" (p. 120).

The law relating to courts-martial has always declared:

> "But no sentence of a court-martial *shall be carried into execution* until after the whole proceedings have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life or dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, *be carried into execution*, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders in the case. * * *"
>
> 2 Stat. at L. 367, Chap. 29; 65th Article of War;
> 41 Stat. 796; 10 U. S. C. A. 1517;
> 46th and 48th Articles of War.

The law relating to a stay of execution of a sentence of a court-martial is identical with Rule 5 of the Supreme Court, supra, providing that "An appeal from a judgment of conviction stays the execution of the judgment." The law requiring the court-martial proceedings to be laid before the President or a particular officer is in effect an automatic appeal, pending which all parts of the sentence are prevented from being carried into execution. As the disqualifying phases of the penalties provided for desertion are not operative pending the automatic appeal, so the disqualifying phases of the statute in question are not operative pending an appeal.

In *Burton* v. *United States*, 202 U. S. 344, the question involved was whether the disqualification provision of the statute involved herein applied to a United States Senator. The decision strongly intimates that it only became operative on final conviction, as is evidenced by the language found at page 369.

> "But the *final judgment* of conviction did not operate, *ipso facto*, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment."

The Government's contention is that the disqualification became effective immediately upon the pronouncement of sentence and judgment. The statute does not state that the disqualification shall attach upon conviction or rendition of judgment, it is silent in this regard. It merely provides that any one who does the denounced acts shall suffer the specified consequences. The Government could equally contend that the mere doing of the acts carried with it the penalty, even though there had been no trial, conviction, sentence or judgment. This is exactly what was contended for in the desertion cases quoted from above. The statute must be strictly construed. The penalties of fine, imprisonment and disqualification are stated in the conjunctive. They all only become operative on final judgment.

The lower court relied on decisions from some state courts which hold that a disqualification clause becomes operative on conviction and is not stayed by appeal. In each of the state cases it will be found that the statute involved expressly provided that the disqualification should attach upon conviction, and each case dealt with an incumbent's right to continue to hold a civil office. The reasoning adopted by such state courts is that it would be an absurdity to hold that a public official who is convicted and

incarcerated in a jail or prison could continue to perform the duties of his civil office.

The reasoning of the state courts cannot apply to the instant case for several reasons. First, the statute in question, in the case at bar, pertains to army officers as such and contains three different penalties that become operative in the conjunctive. Second, the statute in question neither expressly nor impliedly states that the disqualification shall become effective immediately upon conviction; but leaves such clause in exactly the same category as the clauses providing for fine and imprisonment. Third, no authority exists for preventing a state officer from performing his official duties except by removal from office; *while an army officer can be relieved of all duties by his superior officer pending the determination of a conviction either in a court or by a court-martial.*

Congress not having provided otherwise, the statute must be given a reasonable construction in accordance with the established rules of interpretation, to-wit: that the penalties provided and all thereof do not become operative until final judgment.

Petitioner's contention finds full support in the action of Congress whereby the 118th Article of War, relating to the removal of officers of the Army, was amended in 1920 by the addition of the following clause:

> "* * * but the President may at any time drop from the rolls of the Army any officer * * * who has been absent in confinement in a prison or penitentiary for three months after *final conviction* by a court of competent jurisdiction."

This constitutes a clear indication that Congress never intended that an officer should be dropped from the Army rolls unless there was a final conviction as to such officer.

As the disqualification clause of the statute could only

take effect on the judgment becoming final, and as execution of the judgment and the whole thereof was stayed by appeal and the judgment nullified by the Court of Appeals, plaintiff never ceased to be an officer of the Army as the result of said conviction.

2. *On the Date Lt. Col. Laubach was Confirmed as Colonel, Petitioner, as a Matter of Law, Was on the Retired List and the Confirmation of Laubach as Colonel Did Not Operate as a Dismissal of Petitioner from the Service.*

Temporarily assuming, without conceding, that under the decision of *Blake* v. *United States*, 103 U. S. 227, the President, with the consent of the Senate, may effect the removal of an officer of the Army on the *active* list, by appointment of another to his place, the facts herein do not establish that plaintiff was removed from the Army by the nomination and appointment of Lt. Col. Laubach to the position of colonel, as petitioner was then a colonel on the *retired* list.

The service record of petitioner discloses that on April 11, 1896, petitioner joined the Army as a private and that on April 11, 1936 he had completed 40 years of service in the Army.

On April 11, 1936, petitioner made application in writing to be immediately retired from active service and placed on the retired list in accordance with the act of June 30, 1882, incorporated in Title 10, sec. 942 U. S. C. A. which reads as follows:

> "When an officer has served forty years either as an officer or soldier in the regular or volunteer service, or both, *he shall,* if he make application therefor to the President, *be retired from active service and placed on the retired list.*"

There is nothing ambiguous about the foregoing provision. It explicitly states that one who has served forty

years *shall* be retired from active service and placed on the retired list. The provision is mandatory and self-executing. It requires no action by the President or any other official, save a ministerial one. The act gives to the officer an absolute right, he being not otherwise disqualified, to be immediately placed on the retired list upon his making application therefor.

The mandatory character of the provision is made manifest when consideration is given to the succeeding sections of the Code.

> "When an officer has been thirty years in service, he may, upon his own application, *in the discretion of the President*, be retired and placed on the retired list." (10 U. S. C. A. 943.)
>
> "Any officer on the active list of the Regular Army or Philippine Scouts who, on August 1, 1935, or at any time thereafter, shall have completed not less than fifteen nor more than twenty-nine years' service may upon his own application be retired, *in the discretion of the President.*" (10 U. S. C. A. 943A.) (Amended in 1940 giving the discretion to the Secretary of War.)

No discretion is given to anyone as to the placing on the retired list of an officer who has completed forty years of service. When the officer fulfills the prescribed qualifications he becomes an officer on the retired list.

The right to be retired upon completion of forty years of service is given to the officer. Neither the President, Secretary of War, or any other official can place one on the retired list merely because he has completed the forty years of service. The right is vested in the officer and when he claims the right the law gives him the benefits thereof. Neither refusal nor inaction on the part of any official can deprive him of the right or the fruits thereof.

In the instant case, petitioner claimed his right to be placed on the retired list on April 11, 1936, *almost two*

months before Lt. Col. Laubach was confirmed as colonel by the Senate.

It is a maxim of our jurisprudence that, in the administration of justice, a court will consider as having been done that which ought to have been done. When petitioner made application to be retired after forty years of service, the only thing any official of the government could do was the ministerial act of making certain entries in the books and registers of the war department. This ministerial act should have been done either immediately upon plaintiff's application or within a reasonable time thereafter. Two months was more than ample time within which this act could have been performed and, in the instant case, the court will consider that such ministerial act was done as such act ought to have been done.

Thus, it follows, that in June, 1936, when Laubach was appointed colonel, *petitioner was no longer a colonel on the active list*, he, as a matter of law, being a colonel on the retired list, and the appointment of Laubach as colonel could not operate as a dismissal of petitioner from the service.

There is another rule of law which fortifies petitioner's position. Where a party has done all that is required of him by law in order to enjoy a right given him by law, he cannot be penalized as the result of delay on the part of a public officer in performing a ministerial act enjoined on him as the result of the exercise of such right.

This Court has ofttimes applied the foregoing rules.

> "The equitable principles upon which our decision must turn are simple and fundamental. Equity regards that as done which ought to be done. It looks to the true intent and meaning, rather than to the form. It relieves against the consequences of accident and mistake as well as of fraud.
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> "In Lytle *v.* Arkansas, 9 How. 314, 333, 13 L. ed. 153, 160, this court (by Mr. Justice McLean) said: 'It is a well-established principle that where an individual in

> the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him.' "
>
> *Camp* v. *Boyd*, 229 U. S. 530, 560.

Where the party has done all the law requires of him in order to enjoy a right conferred on him by law, the delay of an officer in doing some ministerial act which will put in operation the enjoyment of such right cannot defeat the right. Under such circumstances the court will either confirm the right, by considering the ministerial act done as of the time it should have been done or compel the doing of the act with a retrospective effect as of the time it should have been done.

In *Marbury* v. *Madison*, 1 Cranch 138, Mr. Chief Justice Marshall stated, in dealing with the performance of a ministerial act by the Secretary of State:

> "Where he is directed by law to do a certain act affecting the absolute rights of an individual in the performance of which he is not placed under the direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden * * * in such cases it is not perceived on what grounds the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual * * * ."

To hold contrary to the above contention would be to place in the hands of the President the power to frustrate the plain and mandatory language of the statute. For example:

An officer has completed his fortieth year of service and sends his application to the President to be placed on the retired list for such reason. The President puts the application in a pigeonhole and promptly sends to the Senate for

confirmation the name of another to be appointed to the place and rank of such officer. The Senate confirms the nomination. Under the *Blake* case the officer, who had completed his forty years of service, would be dismissed from the service and deprived of his retirement pay, even though he had an exemplary record and could not have been removed for cause. *Such cannot be the law.* As said by the Supreme Court of Montana:

> "To say that the courts are helpless to compel performance of such a duty, merely because the time within which the duty should have been performed has elapsed, is tantamount to holding that a public official, by delaying action until the time designated by law for action has expired, may defeat the will of the people as expressed by the legislature, and that there is not any redress for those who are injured by such nonaction."
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> *State* v. *Chouteau County*, 44 Mont. 51, 70.

Here the petitioner had served forty years, made application to be retired and had done all in his power to do to enjoy the right given him by law. Such right thereupon became vested and absolute and no nonaction on the part of any government official or any action tending to defeat or deny that right could operate to divest petitioner of that which the law had conferred upon him.

Thus, when Laubach was confirmed as a colonel on the *active* list, it did not oust petitioner from the Army as he was then a colonel on the *retired* list.

3. *The Decision of the Court of Claims, That in Computing Time Served Under the Forty Year Retirement Statute Time Served on the Retired List Must Be Excluded, Is Erroneous and Contrary to a Prior Decision of This Court.*

Petitioner entered the regular Army of the United States on April 11, 1896, and had completed forty years of service on April 11, 1936, when he made application to be retired

under 10 U. S. C. A. 942, quoted *supra* and *infra*. From 1906 to 1916 Petitioner was on the retired list and in the latter year was transferred back into active service (R. 7).

The Court of Claims held that in computing the 40 years provided for in the statute, the ten years served on the retired list must be excluded.

Thus, we have a situation where an officer, who during forty years of service at one time has been legally transferred to the retired list and then transferred back to the active list, must forfeit the time served on the retired list and cannot be accorded the privilege of the retirement statute nor be *returned* to the retired list at the expiration of forty years of service.

The holding of the lower court is contrary to the plain wording and intent of the statute and in conflict with the decision of this court in *United States* v. *Tyler*, 105 U. S. 244.

The retirement statute does *not* read that the officer seeking retirement must have served forty years on the active list. The statute reads as follows:

> "When an officer *has served forty years* either as an officer or soldier *in the regular or volunteer service*, or both, he shall, if he make application therefor to the President, be retired from active service and placed on the retired list."

One is serving with the regular army both while he is on active duty and when he is on the retired list. Such is the express holding in *United States* v. *Tyler*, 105 U. S. 244, although, it would seem, that the statute defining what constitutes the regular army should be sufficient answer to the problem.

> "The Regular Army of the United States shall consist of the Infantry, the Cavalry, the Field Artillery, * * * *the officers and enlisted men of the retired list;*

and such other officers and enlisted men as are now or may hereafter be provided for."

Title 10, sec. 4 U. S. C. A.

As the statute expressly provides that "officers and enlisted men of the retired list" are a component of the Regular Army, service on the retired list must be computed as part of the forty years of service "in the regular service."

In *United States* v. *Tyler, supra*, the contention was advanced that an officer on the retired list was not in the service. The Supreme Court held that such officer was in the service.

> "The provisions of the statutes, and the uniform treatment of these officers, is conformable to this view, and necessarily implies, that while not required to perform full service, they are a part of the army, and may be assigned to such duty as the laws and regulations permit.
>
> "Section 1094 of the Revision designates specifically, by a catalogue of twenty-eight items, of what the army of the United States consists, and the twenty-seventh item of this enumeration is 'The officers of the army on the retired list.'
>
> "They are then by law a part of the army.
>
> "Section 1256 enacts that 'Officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the Army Register, and shall be subject to the Rules and Articles of War, and to trial by general court-martial for any breach thereof.'
>
> "Section 1259 declares that they may be assigned to duty at the Soldier's Home; and section 1260, that they may be detailed to serve as professors in any college.
>
> "It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne on its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are sub-

> ject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service. * * *
>
> "We are of opinion that retired officers are in the military service of the government * * *."
>
> *United States* v. *Tyler*, 105 U. S. 244, 245-246.

The statutes of the United States relating to officers on the retired list have remained substantially the same as those mentioned in the foregoing case. (See, 10 U. S. C. A. secs. 991, 992, 994, 995, 996, 1023 and 1028.)

The retirement statute provides for forty years in the "regular service." The statute defining the Army of the United States uses the phrase "regular Army," and makes the officers on the retired list part of the regular Army. Clearly the words "regular service" are synonymous with the words "regular Army." Just as clearly, the word "regular" *cannot* be construed to mean "active."

On April 11, 1936, petitioner had completed forty years of service in accord with the language of the retirement statute and the lower court was in error in holding to the contrary.

4. *Petitioner Sent His Request for Retirement Through the Proper Channels.*

The lower court, without deciding the question, states the Government's contention that "the plaintiff did not apply to the President, as the statute requires, but to the Adjutant General" (R. 24) for retirement.

While it is true the retirement statute provides that an officer shall be retired if "he makes application therefor to the President", there are various means whereby an application can be made to the President and. in the instant

case, *petitioner's application had to be and was made in the manner prescribed by the Army Regulations.*

Under the Army Regulations an officer does not communicate directly to his Commander in Chief, but must send his communications, petitions and requests through the channels prescribed by the Army Regulations, which are, of course, the regulations prescribed by the Commander in Chief or in other words the President of the United States.

In the instant case plaintiff, on April 11, 1936, addressed a written communication to The Adjutant General making application for retirement under the foregoing statute.

Under the Army Regulations all communications to the President of the United States must be sent to and through The Adjutant General.

The pertinent provisions of the Army Regulations are as follows:

Section I, A. R. 15-5, paragraph 3, makes it the duty of The Adjutant General to receive, record and conduct correspondence concerning the military service of the United States.

Section II, A. R. 340-15, paragraph 21, provides:

> "To War Department from Army:
>
> a. Except as otherwise authorized by the Secretary of War, all official communications from the Army intended for consideration in the War Department will be addressed—
>
> (1) Except as prescribed in (2) below, to The Adjutant General.
>
> (2) If it pertains solely to the business of a branch or bureau, to the Chief thereof."

Section II, A. R. 350-15, paragraph 23, makes it the duty of The Adjutant General *to submit for action all written communications received in his office, from any source, which require action by the President.*

In addition thereto the law vests in The Adjutant General's Department the following duties:

> "The Personnel Bureau shall be charged, under such regulations as may be prescribed by the Secretary of War, *with the operating functions of procurement*, assignment, promotion, transfer, *retirement*, and discharge *of all officers and enlisted men of the Army.*"
> 10 U. S. C. A. 42.

Plaintiff was required under the foregoing regulations and law to address his request for retirement through the channels so provided and he properly addressed his request to The Adjutant General of the United States.

5. *The Court of Claims Erred in Holding That the Appointment and Confirmation of Laubach as Colonel Operated to Oust Petitioner from the Army.*

The Court of Claims, on the authority of *Blake* v. *United States*, 103 U. S. 227, held that the appointment and confirmation of Laubach as colonel operated to remove petitioner as an officer of the Army (R. 24).

There are various reasons why this holding of the lower court is erroneous.

First, we call attention to the fact that the doctrine in the *Blake* case, if operative to-day, can only apply when an officer on the active list is promoted to a rank then occupied by another officer on the active list. In the instant case petitioner was an officer on the retired list at the time Laubach was confirmed as colonel and so the reasoning and doctrine in the *Blake* case cannot apply.

The additional reasons why the doctrine in the *Blake* case does not operate in the instant case will be discussed under the following headings:

a. *The power of the President, with consent of the Senate, to oust an officer of the Army by appointing another to his place can only be exercised when there is an actual vacancy to be filled or where there is an intent to oust the officer holding the position.*

It should first be noted that in the instant case the action of the President and Senate in appointing Laubach as colonel was not taken because there was an actual legal vacancy existing due to the removal of petitioner from office, nor was such action taken with intent to remove petitioner from office. The action appointing Laubach colonel was taken by both the President and Senate on the mistaken assumption that by operation of section 113 of the Criminal Code petitioner had ceased to be an officer in the Army by operation of law. That such was not the effect of his conviction has heretofore been argued.

In the cases of *Blake* v. *United States, supra,* and *Wallace* v. *United States,* 257 U. S. 541, there was an actual legal vacancy which both the Senate and President sought to fill.

In the *Blake* case, Blake, a chaplain in the Army, had tendered his resignation which had been accepted. Thus, a valid and actual vacancy existed to which his successor had been appointed. Blake claimed that his resignation had been tendered when he was of unsound mind and was therefore inoperative. The court held that there was a vacancy, and another having been appointed to his place he no longer was an officer in the Army.

In the *Wallace* case, the President, while the Nation was at war with Germany, dismissed Wallace from the Service. The dismissal was valid and in pursuance of the powers vested in the President in the time of war. Another was nominated and confirmed to Wallace's place. The rule in the Blake case was held to apply.

However, in the *Wallace* case this court used language clearly indicating that if no actual legal vacancy existed a different conclusion would have been reached. We quote from page 546 of the reported case:

> "We must presume, therefore, in the absence of any showing to the contrary, that the Senate was advised of the facts in respect to the nomination of Lieutenant Colonel Smith, and that it intended to supply the vacancy occasioned by the dismissal of appellant. *Otherwise we must conclude that the Senate committee was recommending, and the Senate was deliberately voting confirmation of, a nomination to a place for which there was no provision by law.*"

In the instant case, there was no legal or actual vacancy. There was not even an intent on the part of the President or the Senate to create such vacancy, nor was there an intent to dismiss plaintiff from the service in order to create such vacancy. There was no order of dismissal made by the President, Secretary of War or any other person. All that was done was the indulging in an assumption that by operation of the penal clause of section 113 of the Criminal Code a vacancy was created by operation of law. No such vacancy occurred and no such vacancy was created. Section 113 did not operate to create any vacancy as there was never a final judgment against plaintiff under that section.

In order to comply with the rule in the *Blake* and *Wallace* cases there must be a vacancy and a joint intent on the part of the President and Senate to fill that vacancy or a joint intent to oust one holding a position by the appointment of another to such position. Herein we find none of these essential elements. Legally, there was no vacancy. *There was no intent to oust plaintiff, only an intent to fill a vacancy which was erroneously thought to exist.* The action of the Senate herein was of no more effect than the raising of Naval Lieutenant Peck to the rank of Lieutenant-

Commander, in which case the Court of Claims held that such elevation was inoperative as there was no vacancy to which he could have been appointed. (*Peck* v. *United States*, 39 Ct. Cl. 125.)

The Court of Claims argued that to hold that petitioner was still an officer of the Army, the result would be to demote Colonel Laubach and to demote all those officers of lower rank who had been raised as the result of his promotion. (R. 23) This, however, is not the law. Since 1920 Congress intended that no such result should be brought about under such circumstances and in that year enacted a statute which reads as follows:

> "Any officer appointed under the provisions of law to a grade in which no vacancy exists, shall be an additional number in that grade until absorbed, and no longer."
>
> *10 U. S. C. A. 494.*

Thus, where an officer is now commissioned to a grade in which no vacancy exists, he is not automatically demoted due to such fact even though there was a mistake as to the existence of such vacancy when his commission took effect.

It would seem that this statute is peculiarly effective in cases such as the present one. Where an officer is removed from the active list, due to some mistake of law or fact, and another commissioned in his place, neither of such persons are to be penalized. The officer who never lost his rank or position continues to hold the same and the list of promotions made as the result of the error continue to be effective.

b. *The President no longer has the power to dismiss an officer from the service by appointing, with consent of the Senate, another to fill his place.*

In the case of *Blake* v. *United States*, supra, and several cases decided thereafter it was held that originally the President, having the power to appoint officers in the Army

had the power to remove them. This holding was based on the fact that when an officer is appointed for an indefinite term of office he holds such office at the pleasure of the appointing power. At the time of the Civil War Congress abridged this power, but it was held that such legislation only took from the President the absolute power of removal by making the exercise thereof depend on the consent of the Senate. Following this premise the Supreme Court held that when the President nominated an officer to the place of an incumbent and such nomination was approved by the Senate, such action acted as a removal from the service of the incumbent.

Since the foregoing decisions the law had undergone a radical change. Immediately preceding, during and after World War I, Congress revised practically all of the statutes dealing with the Army, including the power of the President to remove officers. (See Act of June 3, 1916, as amended in 1920, 41 Stats. Chapter 227.)

No longer does a commissioned officer hold his rank and commission for an indeterminate duration.

> "Officers of all grades in the Infantry, Cavalry, Field Artillery, Coast Artillery Corps, Corps of Engineers, and Medical Department; officers above the grade of captain in the Signal Corps. Judge Advocate General's Department, Quartermaster Corps, Ordnance Department and Chemical Warfare Service * * * *shall be permanently commissioned in their respective branches.* * * *" (10 U. S. C. A. 487)

Though judicially unconstrued, it seems clear that the foregoing statute makes the tenure of any commissioned officer permanent until he has reached sixty-four years of age, at which time he still retains his commission but becomes an officer on the retired list.

In 1920 Congress amended the 118th Article of War (41 Stat. 811), so that it now reads differently from what

it did when the *Blake* case was decided, by adding a new clause which we print in italics.

> "No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace, no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; *but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.*" (10 U. S. C. A. 1590)

By the revision of 1920 Congress also added the provision that an officer appointed to a grade in which no vacancy existed shall be carried as an additional number in that grade until absorbed. (10 U. S. C. A. 494, supra.)

Considering that present day legislation, public opinion and government policy are all directed toward the security of the individual in his calling, work or profession, it should be manifest that Congress intended that officers in the armed forces should be accorded the same security that a private citizen enjoys, and that no officer should lose his position and the fruits of many years of service except for cause.

By making an officer's commission permanent and by adding the clause to the 118th Article of War expressly providing in what instances, in time of peace, an officer may be dropped from the rolls of the Army, added security was given to an Army officer. Reading the entire 118th Article of War demonstrates the Congressional intent to limit the power of removal of an officer in time of peace to the instance wherein he has been dismissed pursuant to the sentence of a general court martial or where some express Act of Congress operates as a removal.

A reading of the *Blake* case discloses the political reasons that led to the adoption of the rule therein announced. The construction was arrived at by considering the legislation that theretofore existed and was repealed by the addition of the clause limiting the President's power. Such reasons and background did not exist when the law was revised in 1916 and 1920. The reason for the rule having ceased the rule itself must likewise cease.

Conclusion.

In view of the foregoing it is respectfully submitted that the holdings of the Court of Claims are without support in our law, that the lower court has construed statutes in a manner not warranted by their language and not in conformity with the prior decisions of this court.

Petitioner never ceased to be an officer of the United States Army. His conviction under section 113 of the Criminal Code did not operate to deprive him of his position as his appeal stayed the execution of the judgment and the reversal of his conviction erased the effects thereof. The appointment of Laubach was made under a mistake of law and done upon the erroneous assumption that the conviction of petitioner deprived him of his office. If petitioner was not, as he contends, an officer on the retired list when Laubach was appointed colonel the petitioner continued to hold his rank of colonel on the active list and Colonel Laubach became an additional member in that grade. If, as petitioner contends, he was on the retired list when Laubach was appointed colonel, then the appointment of Laubach could not operate as a dismissal of plaintiff from the service. But in addition to all of these contentions petitioner was not ousted from the service by the appointment of Laubach as colonel because under the law as it has existed since 1920 the latter's appoint-

ment was not made for the purpose of filling a regular vacancy nor with the intent to create a vacancy and fill it.

All of the matters discussed are believed to be of vital importance at this present time when our Nation is engaged in war and the ranks of our Army have been swelled by thousands of officers. Their rights should be clearly determined and declared by this court.

Dated at San Francisco, January 31, 1944.

Respectfully submitted,

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